UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 4-CA-36852 and 4-CA-36879

BEACON SALES ACQUISITION, INC.
D/B/A QUALITY ROOFING SUPPLY
COMPANY,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 542, AFL-CIO.

RESPONDENT BEACON SALES ACQUISITION, INC. D/B/A QUALITY ROOFING SUPPLY COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Date: August 24, 2010

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Respondent Beacon Sales Acquisition, Inc. ("Beacon") d/b/a Quality Roofing Supply Company ("Quality") respectfully submits this brief in support of its concurrently-filed exceptions to the July 29, 2010 Decision of Administrative Law Judge ("ALJ") David I. Goldman. For the reasons set forth below, the Proposed Order should be reversed and the Consolidated Complaint should be dismissed.

Preliminary Statement

This case presents two legal issues that the ALJ correctly held turn upon the interpretation of certain written agreements. Issue one relates to Quality's inclusion of the bargaining unit members in Quality's January 2009 annual and recurring company-wide health care contribution increase. The Union challenged this in a December, 2008 unfair labor practice charge ("First Charge") that was withdrawn "with prejudice" as part of Quality's February 2009 global settlement with the Union and Region IV, documented in one Formal and one so-called "Non-Board" settlement agreement. The ALJ incorrectly held that

the Union's June, 2009 charge ("Second Charge"), again challenging the January 2009 health care contribution increase, is permissible because the Second Charge is different than the First Charge and because the Regional Director of Region IV was not a party to the so-called Non-Board settlement agreement that required the withdrawal of the First Charge with prejudice. This ruling is erroneous for five reasons.

First, the ALJ incorrectly held that the Second Charge (the implementation of the increase) was different than the First Charge (impasse in bargaining over the increase) because Quality had to demonstrate overall collective bargaining impasse before it could implement the recurring annual health care increase based upon impasse in the increase-specific bargaining. The ALJ erred by holding that there was no support in the record for applying an exception to the Bottom Line Enterprises rule, which generally requires overall bargaining impasse before an employer may implement a proposal on a mandatory bargaining subject. However, Quality's October 23, 2008 letter to the Union (Joint Exhibit 3) makes clear that the health care premium increase was an annual recurring one, allowing Quality to implement if it reached impasse on bargaining over that issue, under the so-called Stone Container exception to the Bottom Line Enterprises rule.

Second, as to impasse, the ALJ misconstrues and misapplies Quality's stipulation regarding bargaining. In his decision, the ALJ selectively quotes from the parties' stipulation by holding that Quality stipulated that it "implemented [health care premium increases] without affording the Union sufficient opportunity to bargaining them." This quotation ignores the predicate to Quality's stipulation: "Consistent with its second amended answer in this matter." In Quality's second amended answer (Joint Exhibit 2(s)), Quality makes clear that, for expediency, it had chosen not to present any evidence as to the actual sufficiency of

bargaining. Why? Because Quality did not need to present any such evidence in light of the Union's withdrawal of the bargaining charge "with prejudice." As explained herein, and as the ALJ correctly held at an earlier portion of his decision, the "with prejudice" withdrawal results in the question of increase-specific impasse being deemed to have been adjudicated in Quality's favor. Thus, having "won" on the impasse by virtue of the settlement, Quality did not need to incur either the time or expense of re-litigating whether it actually did, or did not, bargain to impasse on the 2009 health care contribution increase. In his holding, the ALJ rules on the one hand that the "with prejudice" withdrawal means that the parties were at impasse, but on the other hand that Quality still loses because it stipulated that the parties were not at impasse. This is an internally inconsistent ruling that is not supported by the uncontroverted record.

Third, the ALJ erred by holding that, even if the parties' impasse in December 2008 was sufficient to allow implementation, Quality did not demonstrate that the parties still were at impasse on January 3, 2009 when the changes were implemented. Here, the ALJ again ignores Joint Exhibit 3, in which Quality advised the Union in October, 2008 that the health care increase would go into effect on January 1, 2009. Thus, Quality did nothing more than immediately implement its proposal in light of the impasse reached in late December, 2008 (which increase went into effect on the first pay period of 2009, and the first work week of 2009 ended on January 2, 2009, a fact of which the Board may take judicial notice). Neither the General Counsel nor the Union presented any evidence that the Union offered to break the impasse, or that anything at all happened during the Christmas holiday between impasse and the previously-declared implementation date, and it was not Quality's burden to establish that the impasse remained.

Fourth, the ALJ erred by holding that even if the parties were at impasse and that the impasse allowed Quality to implement, there was no evidence that the Union intended to waive its right to challenge implementation as opposed to the declaration of impasse. Here, the ALJ misconstrues the law concerning the res judicata effect of a "with prejudice" withdrawal. Absent a clear carve-out in the parties' settlement to allow a future challenge to implementation, which does not exist in this case and which would have been the Union's burden to show in any event, the parties' intent is irrelevant to the res judicata effect of a "with prejudice" withdrawal. Most glaringly, although the ALJ took pains in his opinion to address virtually every case cited by the parties, he conspicuously omitted any attempt to address or distinguish Quality's reliance on the Fifth Circuit's recent decision in Oreck Direct, LLC v. Dyson, Inc, which is four-square with this case. Nor did the ALJ cite any other "with prejudice" withdrawal cases in his opinion.

Fifth, the ALJ left open the question of whether the Regional Director was bound by the Non-Board settlement agreement. The ALJ held that there was an inconsistency between the Board's Auto Bus and Septix cases. Not so, as those cases are reconcilable and lead to the conclusion that because the Regional Director was personally involved in reviewing, editing and approving the Non-Board settlement here, she is bound by it, and that even if the Regional Director herself is not bound, the purpose underlying the National Labor Relations Act warrants enforcement of the Non-Board settlement agreement.

Issue two is whether Quality could refuse to bargain between July 9, 2009 and August 10, 2009 without a federal mediator. The ALJ correctly rejected the General Counsel's assertion that the parties' "Grounds Rules" agreement was unenforceable ab initio. The ALJ erred, however, by holding that, even though the agreement states that the parties

"agree to utilize the FMCS mediator during their negotiations," it did not mean that the parties agreed "exclusively" to bargain before a federal mediator, and thus the Union was free, whenever it chose, to insist on bargaining without a mediator. The ALJ's interpretation not only ignores the plain meaning of the agreement, but it also renders the 30-day termination provision in the contract superfluous. For these reasons, the ALJ violated a well-settled rule of contract interpretation that agreements are to be construed pursuant to their plain meaning and so as not to render any provision superfluous.

Statement of Facts

A. Background and Certification of the Bargaining Units

Quality is a regional supplier of roofing and building materials and is a subsidiary of Beacon Sales Acquisition, Inc., a subsidiary of publicly-traded Beacon Roofing Supply. See Form 10-K for Beacon Roofing Supply, www.beaconroofingsupply.com.[1] Beacon has 179 locations (id.), 14 of which are part of Quality, which operates in Pennsylvania, New Jersey and Delaware. Four of Quality's branches are involved in this matter – North Wales, York, Eddystone and Yeadon. Of Beacon's approximate 2,258 employees (id.), only 13 are members of the bargaining units in this case. Joint Exhibit 5.[2] The bargaining units were certified in late 2007.

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[1] Beacon's Annual Report (SEC Form 10-K) is filed with the Securities & Exchange Commission and thus is a public record. Judicial notice of this document may be taken pursuant to Federal Rule of Evidence 201(b)(2), made applicable through Section 102.39 of the Board's Rules. See 1-201.12 Weinstein's Federal Evidence § 201.12 n. 95.

[2] Citations to "Joint Exhibits" refer to the Joint Exhibits submitted with the parties' Stipulation.

B. Quality Notifies the Union of the 2009 Health Care Contribution Increases, Bargaining Ensues, and the Union Files a Charge Alleging that Quality Prematurely Declared Impasse in the Bargaining

On October 23, 2008, Quality notified the Union of Quality's intention to apply its Company-wide 2009 health care contribution increases to the bargaining unit members and offered to bargain with the Union over the proposed increases. Joint Exhibit 3. That letter put the Union on clear notice of the annual nature of the increase when it stated:

> Consistent with its *annual* practice, the Company intends to make the benefit changes below effective January 1, 2009 for all employees, including those represented by Local 542 ("the Union").

Id. (emphasis added).

Bargaining sessions ensued, and on December 29, 2008, the Union filed Charge 4-CA-36509, claiming that "on or about December 22, 2008," Quality improperly "declared impasse on Health Care" without adequate bargaining or provision of required information. Joint Exhibit 4. Based upon this declaration of impasse, Quality applied the contribution increases to the bargaining unit members on January 3, 2009. Fact Stipulation 5.[3]

C. Quality, the Regional Director and the Union Negotiate and Execute The Formal Settlement, the "Non-Board" Settlement, which the Regional Director Reviewed, Revised and Approved, all Pending Charges Are Resolved, and the Union Withdraws Charge No. 36509 "With Prejudice"

In January 2009, Quality, the Regional Director and the Union were negotiating a Formal Settlement Stipulation of various then-outstanding unfair labor practice charges. Fact Stipulation 9. The Formal Settlement addressed unfair labor practice charges that, to that

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[3] The Board may take judicial notice that the first work week of 2009 ended on Friday January 2, 2009. The General Counsel alleged the implementation date to be Saturday January 3, 2009. We assume that was merely a scrivener's error, but it is of no materiality to the analysis.

time, had been brought to complaint. Joint Exhibit 16. The Regional Director, through her counsel, sent counsel for Quality the first draft of the Formal Settlement Stipulation on January 30, 2009. Joint Exhibit 9.

At the same time, Quality and the Union were negotiating an informal, so-called "Non-Board" settlement, of various other unfair labor practice charges that had not been brought to complaint, and the parties reached an agreement that was executed by the Union on February 4, 2009. Joint Exhibit 6. By its terms, the Non-Board settlement links the Formal and Non-Board settlements. Id. For example, paragraph 3 of the Non-Board requires the Union to sign the Formal Settlement as part of the Non-Board settlement. Id. In addition, paragraph 3 requires the Union to waive the requirement of the Formal Settlement that Quality produce certain records to the Union immediately. Id. Paragraph 4 of the Non-Board settlement requires the Union to withdraw all pending unfair labor practice charges "with prejudice." Id.

As a result, on February 5, 2009, the Union requested that the Regional Director withdraw Charge No. 36509 "with prejudice." Joint Exhibit 7. The next day, the Regional Director approved "the Charging Party's Request" to withdraw Charge No. 36509. Joint Exhibit 8.

The Regional Director's involvement in the Non-Board settlement, however, was only beginning. On February 5, counsel for the Regional Director e-mailed Quality's counsel to state that the Regional Director had not yet completed her review of the settlements, which necessarily included the Non-Board Settlement. Joint Exhibit 10. On February 6, the Regional Director's counsel informed the Union, but interestingly, not Quality, that the Regional Director herself was still reviewing the settlements. Joint Exhibit

11. Later that day, Counsel for the Regional Director requested a phone conference with Quality and its outside counsel to discuss "all" settlement documents. Joint Exhibit 12. Earlier that day, the Regional Director's counsel referred Quality to an Internal NLRB memo, OM-07-27, as governing the Regional Director's review. Joint Exhibit 13. That memo specifically addresses the factors governing settlements set forth in Independent Stave Company, 287 NLRB 740 (1987) and, importantly, withdrawals of claims without the right to refile. Joint Exhibit 13 at pages 3-4. During that conference call, counsel for the Regional Director insisted that Quality revise the Non-Board settlement in order to get the Regional Director's approval of the withdrawal of all pending charges. Joint Exhibit 14.[4]

On February 9, 2009, Counsel for the Regional Director e-mailed Quality's counsel suggesting changes to the Non-Board settlement. Joint Exhibit 15. This e-mail makes clear that the Regional Director's review included the Non-Board settlement and that Quality's concession to the Regional Director's changes would "bring all outstanding unfair labor practice charges to a final result." Id. (emphasis added). On February 17, 2009, Quality executed the amendment to the Non-Board settlement requested by the Regional Director together with the Formal Settlement Agreement and returned the signature pages to the Regional Director's counsel. Joint Exhibit 18.

On June 19, 2009, the Union filed Charge No. 36852, alleging that: "on or about December 26, 2008, the Employer implemented an increase to Employees Health Care

[4] The General Counsel presented no evidence rebutting any of the statements in Joint Exhibit 14 or contesting Quality's synopsis of what occurred during that phone call.

Contributions without bargaining and providing information to the below Certified Union." Joint Exhibit 2(a).[5] This case ensued.

D. To Avoid the Expense of a Hearing on the Actual Sufficiency of Bargaining, Which Would Outmeasure the Amount in Controversy, Quality Withdrew Its Defense that Bargaining was Sufficient and Relied Solely on the Union's "With Prejudice" Dismissal of the Impasse Charge

In the Consolidated Complaint, the General Counsel alleged that Quality implemented the 2009 health-care increases without affording the Union a sufficient opportunity to bargain. Joint Exhibit 2(g). In its original Answer, Quality asserted two defenses to this allegation. First, Quality asserted that the sufficiency of bargaining was moot because the Union's impasse charge was withdrawn "with prejudice," thereby allowing Quality to implement its proposal. Joint Exhibit 2(i) at ¶ 6. Secondarily, Quality asserted that it did actually bargain to impasse. Id.

As the date for the hearing approached, Quality and the General Counsel attempted to stipulate to facts that would obviate the need for a lengthy and expensive hearing, largely devoted to the "he said/she said" of the health care bargaining sessions that occurred in December 2009. Indeed, it was clear that the cost of travel to Philadelphia for the hearing and outside counsel fees would far outmeasure the few thousand dollars at stake in the health care increases (Joint Exhibit 5 shows the increases, which in some cases are negligible and in some cases resulted in lower employee costs).

Thus, to support a fact stipulation, Quality amended its answer to provide:

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[5] As noted above, n.3, although the Union alleged that implementation occurred on December 26, the 2009 increase went into effect in the first pay period of 2009. For the reasons set forth herein, given the General Counsel and the Union's failure to introduce any evidence that the impasse was broken between impasse on December 22 and implementation, the few days' discrepancy in timing of implementation is not material.

> Quality withdraws its prior averment that Quality fully bargained with the union to impasse over Quality's proposal to implement the 2009 health care rates prior to the union's filing of the charge, which the union withdrew with prejudice. Quality does so because in its view the total amount in controversy for the health care contribution increase exceeds the cost of presenting testimony on the actual bargaining that occurred in late 2008. Thus, for purposes of limiting the hearing, Quality hereby waives any defense to the allegation that bargaining was insufficient and will stand for purposes of this allegation on its affirmative defense that the Charge was withdrawn with prejudice preventing it from being re-litigated herein.

Joint Exhibit 2(s) at ¶ 6.

Quality's Second Amended Answer laid the foundation for the parties' stipulation necessary to avoid a hearing at which evidence would be presented on the actual bargaining that occurred. That Stipulation thus provides:

> *Consistent with its second amended answer in this matter*, Respondent admits that it implemented these changes without affording the Union sufficient opportunity to bargain them, and that the Union did not consent to these changes before they were implemented on January 3, 2009.

Fact Stipulation No. 5 (emphasis added). The ALJ accepted Quality and the General Counsel's Stipulation, over the Union's objections, and ruled on this matter without a hearing.

E. Quality and the Union Execute a Ground Rules Agreement

To govern their return to the bargaining table as part of the Formal Settlement, Quality and the Union executed a so-called "Interim Agreement" – akin to a traditional "Ground Rules Agreement." Joint Exhibit 21. The Agreement provided, among other things, that the parties "agree to meet at FMCS in Philadelphia" and "agree to utilize the FMCS mediator during their negotiations." Id. The Agreement also provided that it would

continue in force until either a Collective Bargaining Agreement was reached or either side provided 30 days written termination notice. Id. at ¶5.

F. The Union Demands to Bargain Outside of FMCS Without Giving 30 Days Termination Notice of the Ground Rules Agreement

At a bargaining session on July 7, 2009, after six months of bargaining sessions utilizing the mediator each time, the Union asserted that it no longer was willing to meet with the participation of a federal mediator, as it has agreed in Joint Exhibit 21. Factual Stipulation 21. The next day, the Union demanded to meet not at FMCS but instead at Quality's North Wales facility or the Union's Fort Washington, PA Union Hall during the week of July 20. Joint Exhibit 22. Quality responded that, pursuant to the Interim Agreement, meetings still needed to be held with the FMCS mediator. Joint Exhibit 22 at p.2. The next day, July 9, 2009, the Union exercised its right to terminate the agreement. Joint Exhibit 24. Quality offered to meet with the Union outside of FMCS beginning 30 days after receipt of the Union's termination notice, or August 10, 2009. Factual Stipulation 22. This case ensued.

Argument

I. Relitigation of the Health Care Contribution Increase Charge Is Barred by the "With Prejudice" Withdrawal of the First Charge (Exceptions 1-19)

The ALJ correctly held that the Non-Board settlement required Charge No. 36509 ("First Charge") to be withdrawn "with prejudice." Decision at 10. The ALJ also correctly held that the Union requested that the First Charge be withdrawn with prejudice, and that the Regional Director granted the Union's request in that regard. Id. at 8. The ALJ's errors all relate to how a "with prejudice" withdrawal of the First Charge bars litigation of the Second Charge. We address each of these errors in turn.

A. Impasse in the Bargaining over the Annual, Recurring Health Care Contribution Increases Allowed Quality to Implement Those Under the Stone Container Exception to the Bottom Line Enterprises Rule (Exceptions 1, 11, 12, 14, 15, 16, 19

The ALJ incorrectly held that the Second Charge (implementation) was different than the First Charge (increase-specific impasse) because Quality had to demonstrate overall collective bargaining impasse before it could implement the recurring annual health care increase based upon impasse in the increase-specific bargaining. Decision at 11. The ALJ erred by holding that there was no support in the record for applying an exception to the so-called Bottom Line Enterprises rule, which generally holds that an employer may not implement a proposal based upon issue-specific impasse on a mandatory subject of bargaining absent overall contract impasse. Id., citing 302 NLRB 373 (1991). However, there is a well-settled exception to the Bottom Line Enterprises rule that allows implementation when impasse is reached in bargaining over annual recurring events that arise during the course of overall collective bargaining. See, e.g., Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004), citing Stone Container Corporation, 313 NLRB 336 (1993). It is well-settled that this so-called Stone Container exception applies to annual increases in employee health care contributions. Id.

As to the facts, contrary to the ALJ's decision, there is ample evidence in the record to support application of this exception. Quality's October 23, 2008 letter to the Union makes clear that the health care premium increase was an annual one, allowing Quality to

implement if it reached impasse on bargaining over that issue. Joint Exhibit 3. Thus, the ALJ's requirement of overall impasse is erroneous.[6]

B. Quality's Stipulation Does Not Prevent It From Relying Upon The Res Judicata Effect of the With Prejudice Withdrawal of the Impasse Charge (Exceptions 1, 13)

The ALJ's second error is that he misconstrues and misapplies Quality's stipulation regarding bargaining. In his decision, the ALJ selectively quotes from the parties' stipulation by holding that Quality stipulated that it "implemented [health care premium increases] without affording the Union sufficient opportunity to bargaining them." Decision at 11. This quotation ignores the predicate to Quality's stipulation: "Consistent with its second amended answer in this matter." Joint Exhibit 2(s) at ¶ 5.

As explained above, in Quality's Second Amended Answer (Joint Exhibit 2(s)), Quality makes clear that, for expediency, it had chosen not to present any evidence as to the actual sufficiency of bargaining. Why? Because Quality did not need to present any such evidence in light of the Union's withdrawal of the bargaining charge "with prejudice." As explained herein, and as the ALJ correctly held earlier in his decision, the "with prejudice" withdrawal results in the question of increase-specific impasse being deemed to have been adjudicated in Quality's favor. Decision at 8, citing Black's Law Dictionary, Special 5th Ed. 1979 (West) ("the term as applied to judgment of dismissals is as conclusive of rights of parties as if action had been prosecuted to final judgment of adjudication adverse to plaintiff."). Thus, having "won" on this issue by virtue of the settlement, Quality did not

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[6] The General Counsel did not advance the Bottom Line Enterprises argument in its brief and cited neither Bottom Line nor Stone Container, nor did the Region ever suggest that the Bottom Line rule served as the basis for its complaint. Because the ALJ raised this sua sponte, Quality had no opportunity or reason to argue Stone Container, and thus did not, as the ALJ suggests, concede the point.

need to incur either the time or expense of re-litigating whether it actually did, or did not, bargain to impasse.[7] In his holding, the ALJ rules on the one hand that the "with prejudice" withdrawal means that the parties were at impasse, but on the other hand that Quality still loses because it stipulated that the parties were not at impasse. This is an internally inconsistent ruling that is not supported by the record, and effectively deprives Quality of the benefit of the Stipulation.[8]

C. Neither The General Counsel nor The Union Presented Any Evidence That The Union Tried to Break the December 26 Impasse Prior to Implementation (Exceptions 1, 7, 8, 16)

The ALJ's third error was his holding that, even if the parties' impasse in December 2008 was sufficient to allow implementation, Quality did not demonstrate that the parties still were at impasse on January 3, 2009 when the changes were implemented. Here, the ALJ again ignores Joint Exhibit 3, in which Quality advised the Union that the health care increase would go into effect on January 1, 2009. Thus, Quality did nothing more than implement its proposal in light of the impasse reached in late December (which increase went into effect, of course, in the first pay period of 2009, and the first work week of 2009 ended on January 2, 2009, a fact of which the Board may take judicial notice).

Neither the General Counsel nor the Union presented any evidence that there was any attempt to break the impasse, or that anything at all happened during the Christmas holiday between impasse and the previously-declared implementation date, and it was not Quality's burden to establish that the Union did not invite further negotiations. See Tru-Serv Corp. v.

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[7] In other words, Quality could have, as a "fallback" position, presented witnesses to testify about what actually occurred in the December 2008 bargaining sessions. The settlement agreement, however, obviated Quality's need to do that.

[8] Again, the General Counsel did not advance the argument adopted by the ALJ.

NLRB, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001), amended 201 US App Lexis 18759, cert. denied, 534 US 1130 (2002).

Tru-Serv is particularly instructive. There the D.C. Circuit reversed the Board's holding that an employer impermissibly implemented certain proposals without bargaining to impasse. After reversing the Board's decision respecting whether impasse initially occurred, the court turned to whether there was any evidence that the impasse had been broken. The court held that "the Union at no time indicated that it was ready to move on any issue that the parties had discussed." Id. at 1117. (emphasis added). The court added that "the record evidence points to no conduct indicating the Union's belief that further negotiations would be fruitful." Id. (emphasis added.)

Here, as in Tru-Serv, neither the Union nor the General Counsel introduced any evidence that the Union contacted Quality to try to break the impasse.[9] In the absence of any such evidence, Quality remained free to implement its proposal in the first pay period of 2009.[10]

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[9] In Tru-Serv, impasse was declared on August 29, 1995 and the Company implemented 8 days later, on September 6, 1995. Here, Quality implemented in almost precisely the same time frame.

[10] Requiring Quality to prove the continuation of impasse creates an almost insurmountable hurdle. Quality in effect would have to call witnesses to testify that each day, it called the Union to test whether the Union had a new proposal. The difficulties with such an exercise is why Tru-Serv properly makes it incumbent upon the Union to demonstrate that it tried to break the impasse prior to implementation.

The timing of the Union's Second Charge also is important. It came only days before the statute of limitation expired, months after implementation by Quality, and in obvious retaliation for the break down in bargaining. It is not as if the Union made its charge immediately after implementation, claiming that Quality had refused to accept the Union's invitation to bargain between the December impasse and the January 3 implementation.

D. The ALJ Erred by Focusing on Whether the Union Intended in the Settlement to Waive its Right to Challenge Implementation, Because the "With Prejudice" Withdrawal of the First Charge Renders The Union's Intent Irrelevant (Exceptions 1, 6, 7, 8, 9, 10, 17, 18)

The ALJ's fourth error is his holding that even if the parties were at impasse and that the impasse allowed Quality to implement, there was no evidence that the Union intended to waive its right to challenge implementation as opposed to impasse. Decision at 10. Here, the ALJ misconstrues the law concerning the res judicata effect of a "with prejudice" withdrawal. Absent a clear carve-out in the parties' settlement, which does not exist and which would have been the Union's burden to show in any event, the parties' intent is irrelevant to the res judicata effect of a "with prejudice" withdrawal. See, e.g., May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1010-11 (10th Cir. 1990) (where settlement agreement fails to preserve certain claims, res judicata effect of with prejudice withdrawal broad and court will not examine intent); also Ratliff Trucking Corp., 310 NLRB 1224 (1993) (specific reservation in settlement agreement necessary to preserve claims inextricably related to those dismissed by settlement).[11]

Most glaringly, although the ALJ took pains in his opinion to address virtually every case cited by the parties, he conspicuously omitted any attempt to address or distinguish Quality's reliance on the Fifth Circuit's recent decision in Oreck Direct, LLC v. Dyson, Inc., 560 F.3d 398, 402 (5th Cir. 2009), which is four-square with this case. In Oreck, a vacuum cleaner company brought a false advertising suit against a competitor ("Suit 1"). Suit 1 was

[11] The ALJ's citations to Metropolitan Edison Company v. NLRB, 460 U.S. 693 (1983); Allison Corp., 330 NLRB 1363 (2000); Georgia Power Company, 325 NLRB 420 (1998) enf'd 176 F.3d 494 (11th Cir.), cert. denied, 528 U.S. 1061 (1999) and Lear Siegler, Inc., 293 NLRB 446 (1989) are inapposite because none of those cases address an effort to relitigate a claim dismissed either with or without prejudice by virtue of a settlement agreement. They are straightforward contract interpretation cases.

not specific as to the models involved nor did it list all the alleged violations known at the time (e.g., "most powerful lightweight"). The parties settled Suit 1 and it was dismissed by the Court "with prejudice," albeit, like here, before the parties' settlement agreement was finalized. Oreck subsequently brought Suit 2, which added different specific allegations that could have been, but were not, alleged in Suit 1. Oreck, making the same argument that the ALJ adopted here, tried to argue that Suit 2 was sufficiently different to be outside of the "with prejudice" withdrawal of Suit 1. The Court of Appeals disagreed, explaining, that because Suit 2 "arose from the same series of transactions" as Suit 1, it was barred by the with prejudice settlement/withdrawal of Suit 1.

The same logic applies here. Both the First Charge and the Second Charge relate to Quality's alleged failure to bargain sufficiently to declaration of impasse and provide required documentation in December 2008 prior to the January implementation of the Company-wide increase. That the Second Charge specified the improper act as the implementation and the First Charge specified the impasse declaration is inconsequential, because reaching impasse allows implementation (under the Stone Container exception). Both Charges involved the very same series of events that occurred in precisely the same time frame: the bargaining prior to the January 2009 health care contribution increase. That is dispositive under Oreck.[12]

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[12] At page 10 of his decision, the ALJ suggests that the implementation charge "is different from the withdrawn claim, involving different facts and elements of proof." The ALJ cites no authority for this conclusion, nor does he explain the different facts or elements of proof necessary to allow implementation after impasse. We surmise that the ALJ's confusion stems from his erroneous belief that overall impasse was necessary and that Quality had to show the continuation of impasse from December 22 to implementation. Thus, the ALJ mistakenly believed that Quality had to show more to sustain implementation. To the contrary, because under Nabors Alaska and Stone Container, Quality could implement based

E. The Board's Auto Bus and Septix Cases are Reconcilable and Both Lead to the Conclusion that The Non-Board Settlement Agreement Should be Enforced (Exceptions 1, 2-5)

The ALJ's fifth and final error on Issue One is his holding that the Board's decisions in Auto Bus, Inc., 293 NLRB 855 (1989) and Septix Waste, Inc., 346 NLRB 494 (2006) are irreconcilable and leave unclear the state of the law on the enforceability of settlement agreements reviewed, but not executed, by a Regional Director. Decision at 8. Not so, as Auto Bus and Septix address different fact patterns and are reconcilable.

Auto Bus holds that where a Regional Director "thoroughly investigates" a Non-Board settlement, it may be binding upon the Region. Similarly, Quinn Company, 273 NLRB 795 (1994), holds that where the Regional Director either "enters into" or "approves" a private agreement, it should be binding. Thus, that the Regional Director here did not sign the Non-Board settlement herself is inconsequential under Quinn Company, for she surely approved it. Indeed, there is unrebutted evidence in the record that the Regional Director did just that. The General Counsel certainly could have presented witnesses, including the Regional Director herself, to rebut, contest or explain the documentary evidence, created by her counsel, which establishes that she reviewed, edited and approved the Non-Board/Formal "package." No such evidence was presented. Thus, the ALJ should have concluded that the settlement agreement was binding despite that it did not bear the Regional Director's actual signature.

Septix addresses the situation in which the Regional Director does not approve a settlement, but the settlement nevertheless should be binding because of the policy considerations underlying the NLRA. As the Board explained:

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on the adjudicated impasse, no additional evidence or proof was required, especially in the absence of any evidence submitted by the Union or the General Counsel after impasse.

> The Board's long-standing and well-established policy is to favor [] private agreements because they advance the Act's purpose of encouraging industrial stability and the peaceful settlement of labor disputes.... This policy of encouraging the peaceful settlement of labor disputes can only be effective if the parties to agreements are not able to circumvent the agreements by later reviving those disputes.

346 NLRB at 495 (2006). In Septix, the Board reversed a decision by an Administrative Law Judge refusing to dismiss allegations that were the subject of a Non-Board settlement because the General Counsel failed to establish that the settlement should not be deemed binding under the factors set forth in Independent Stave Company, 287 NLRB 740. Like in Septix, here the General Counsel can only argue that the Regional Director did not sign the Non-Board settlement, because the General Counsel failed to introduce any evidence on any of the other Independent Stave factors. Thus, even if the Regional Director's signature was necessary to prove that she reviewed and approved the Non-Board settlement (and it is not), then under Septix, the Board still should honor the "with prejudice" withdrawal to comport with the underlying purpose of the Act.[13]

II. Quality is Entitled to the Benefit of the Ground Rules Agreement (Exceptions 20-26)

The ALJ correctly rejected the General Counsel's assertion that the parties' "Ground Rules" agreement was unenforceable ab initio. Decision at 12-15. The ALJ erred, however, by holding that, even though the agreement states that the parties "agree to utilize the FMCS

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[13] Although the Formal Settlement states that future charges may be brought, that provision cannot logically be read to allow re-filing of charges that were withdrawn with prejudice, based upon conduct that occurred before the withdrawal. This provision obviously relates to future conduct. In any event, under basic contract interpretation principles, the more specific language of the Non-Board settlement trumps the more general language of the Formal Settlement.

mediator during their negotiations," it did not provide that the parties "exclusively" would use a federal mediator. Thus, the ALJ held that absent any evidence establishing that the Union intended to forgo its right to bargain without a mediator, the agreement could not be read to provide exclusivity. Id. at 15.

It is well-settled that "the plain and unambiguous meaning of an instrument is controlling." WMATA v. Mergentime Corp., 626 F.2d 959, 961 (D.C. Cir. 1980). Here, the parties' language could not have been more plain or direct: a mediator would be used "during their negotiations." (emphasis added). The word "during" means "throughout the duration, continuance, or existence of." See Webster's Ninth New Collegiate Dictionary (1988); also Dictionary.com (2010). Thus, by specifying the use of a mediator "during" their negotiations, the parties specified that the mediator would be used throughout their sessions, until the agreement was terminated. Thus, the agreement should not be read to mean that the parties would use the mediator for only "some" or "most" of their negotiations.[14]

The ALJ's decision also renders the 30-day termination provision in the contract superfluous. This is because if the Union was permitted, as the ALJ holds, to bargain before a federal mediator only whenever it chose to do so, there would be no importance to a 30-day termination provision. By reading-out this termination provision, the ALJ violates another well-settled rule of contract interpretation that agreements are to be read according to their plain language and so as not to render any provision superfluous. See, e.g., Flynn v. Southern Seamless Floors, Inc., 460 F.Supp. 2d 46, 51-53 (D.D.C. 2006) (citing cases).

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[14] Using the ALJ's logic, a contract that requires an employee to begin work at 9 a.m. would only require the employee to begin work at 9 a.m. on occasion, because the contract does not specify that the employee is to begin work at 9 a.m. "every day." The "plain meaning" rule of contract interpretation avoids such absurd results.

Flynn is instructive because it involves an interpretation of a collective bargaining agreement and an attempt by one party to inject its intent to achieve a result different from the plain meaning of its agreement. In Flynn, the employer and the union had a contract requiring the employer, when sending workers outside the area, to abide by "a standard collective bargaining agreement of a [union] affiliate." Id. at 49. When the union tried to enforce that agreement, the employer argued that it intended only that it would abide by a standard collective bargaining agreement "which it signed" with a local affiliate. Id.

The court rejected the employer's effort to read in additional words and in so doing recited certain well-settled contract interpretation principals misconstrued by the ALJ here. First, the court explained that "in the absence of any ambiguity in [a] collective bargaining agreement....[courts] have no cause to examine extrinsic evidence of the parties' intent." Id. at 51 (ellipses by court). Thus, without holding the agreement to be ambiguous (and it certainly could not be deemed so), the ALJ erred here by examining whether the Union intended to waive the right to bargain without a mediator. The plain language of the agreement should have been the end of the ALJ's inquiry. Id.[15]

Second, the court held that "courts should assume that the parties intended for every part of an agreement to have meaning...[and] should give preference to interpretations that do not render any portion of the agreement ineffective or mere surplusage." Id. at 52. Here, by holding that the Union could abrogate the requirement for a mediator at any time, the ALJ improperly renders the termination provision superfluous. Indeed, the Union itself recognized the importance of the termination provision when it sent its July 9 termination notice. Joint Exhibit 22.

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[15] The General Counsel did not assert any ambiguity in the agreement and instead rested entirely on its incorrect position that the agreement was void ab initio.

Simply put, the agreement is clear and the Union's own actions demonstrate an acknowledgment of the 30-day termination provision. By ignoring the plain language of the agreement, the termination provision, and by reading the agreement in a way designed to capture the Union's alleged intent, the ALJ erred.[16]

Conclusion

Although basic principles of contract interpretation should lead to dismissal of the Consolidated Complaint, there exists a larger public policy consideration, touched upon just briefly above, that also warrants dismissal. The policy issue is whether parties in the NLRB system must abide by their unambiguous written agreements. Here, there is no question over the meaning or import of the agreements. With respect to the health care contribution charge, it is clear that the Union agreed to dismiss it "with prejudice" and repeated those very words in its dismissal request to the Regional Director, who granted the request and later admitted through her agent that all pending charges had been brought to a final end through the settlement. Likewise, the Ground Rules agreement is unambiguous and required a 30-day "opt-out" period. Finding in favor of the General Counsel on either issue will have the dangerous result of discouraging settlements among NLRB parties for fear that the agreements will be unenforceable. Doing this not only would run afoul of Board law and the

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[16] The ALJ also erred by rejecting Quality's argument that any violation was so de minimis as to not warrant any remedy by the Board. See Jimmy Wakley Show, 202 NLRB 620 * 4-5 (1973) ("conduct involved was so minimal and has been so substantially remedied by the Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy"). The ALJ held that, had the Union not relented in it position, Quality's refusal to bargain without a mediator could have continued through the present. Not so, as the Complaint alleges only that Quality's refusal was for the 30-day period between July 9 and August 10 so the only relief that could be granted needs to be limited to that time frame, which already has passed. Thus, given that bargaining resumed and that Quality no longer takes the position that bargaining needs to be before a mediator, there is no reason to grant relief.

policy of the National Labor Relations Act, as summarized in the Septix case discussed above, but would place NLRB litigants in a position unlike those of any other litigant in the American jurisprudence system. To avoid such a wrong and unprecedented result, the Proposed Order should be rejected and the Consolidated Complaint should be dismissed.

Respectfully submitted,

BEACON SALES ACQUISITION, INC.
D/B/A QUALITY ROOFING SUPPLY COMPANY

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CERTIFICATE OF SERVICE

This is to certify that a true copy of Respondent Beacon Sales Acquisition, Inc. D/B/A Quality Roofing Supply Company's Brief In Support of Its Exceptions to the Decision of the Administrative Law Judge was served via electronic mail this 24th of August, 2010 upon:

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I also certify that I sent via electronic mail a copy to:

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